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IN THE
Supreme Court of the United States

October Term, 1943.

No. 436.

**L. METCALFE WALLING, Administrator of the Wage
and Hour Division, United States Department of
Labor,**

Petitioner,

versus

JAMES V. REUTER, INC.,

Respondent.

MOTION TO RECALL WRIT OF CERTIORARI.

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INDEX

	PAGE
MOTION TO RECALL WRIT OF CERTIORARI	1
STATEMENT	3
ARGUMENT	3
APPENDIX	8
EXHIBIT "A"	8
EXHIBIT "B"	12
EXHIBIT "C"	13
EXHIBIT "D"	15
EXHIBIT "E"	17
EXHIBIT "F"	18
SUPREME COURT RULES:	
Rule 7, adopted February 13, 1939, 59 S. Ct. cxlvii	2
STATUTES:	
Louisiana Act 250 of 1928, Sec. 54, as amended	15
Louisiana Act 250 of 1928, Sec. 62	18
Louisiana Act 250 of 1928, Sec. 64	17
CASES:	
Brownlow v. Schwartz, 261 U. S. 216, 43 S. Ct. 263, 67 L. Ed. 620	6
Commercial Cable Company v. Burleson, 250 U. S. 360, 39 S. Ct. 512, 63 L. Ed. 1030	6
First National Bank of Selma v. Colby, 21 Wall. 609, 88 S. Ct. 609, 22 L. Ed. 687	4, 6
Mills v. Green, 159 U. S. 651, 16 S. Ct. 132, 40 L. Ed. 293	4
Oklahoma Natural Gas Company v. State of Oklahoma, 273 U. S. 257, 47 S. Ct. 391 ...	4, 6
United States v. Hamburg-American S. S. Co., 239 U. S. 466, 36 S. Ct. 212, 60 L. Ed. 287	4

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MOTION TO RECALL WRIT OF CERTIORARI.

Now into Court comes Frank S. Normann, counsel of record for James V. Reuter, Inc., formerly a Louisiana corporation, domiciled in the City of New Orleans, and made Respondent herein, and moves the court to recall the order granting the writ of certiorari herein, upon the following grounds:

1. This cause has become moot in that: After the writ of certiorari was granted, James V. Reuter, Inc., original defendant and respondent herein, was dissolved on the 17th day of December, 1943, pursuant to the laws of the State of Louisiana, under and by virtue of which it was created, whereupon its legal existence terminated. (See Appendix Exhibit "C".)

This motion is filed under the authority of United States Supreme Court Rule 7, as adopted February 13th, 1939, and is based on the affidavit of James V. Reuter, the last and former president of the defunct corporation, respondent herein, and on the Certificate of Dissolution of the Secretary of State of the State of Louisiana, dated December 31st, 1943, both of which are attached hereto and made part hereof, as Appendix Exhibits "A" and "B", pages 8 and 12.

Respectfully submitted,

FRANK S. NORMANN,
1605 Hibernia Bank Bldg.,
New Orleans, La.,
Attorney for Mover.

NORMANN & ROUCHELL and
CARLOS E. LAZARUS,
1605 Hibernia Bank Bldg.,
New Orleans, La.
Of Counsel.

STATEMENT.

This suit was brought on January 23rd, 1942, by the Administrator of the Wage and Hour Division to enjoin the respondent, then a Louisiana corporation, from violating certain provisions of the Fair Labor Standards Act (R. 1-5.)

The District Court for the Eastern District of Louisiana held that the defendant below had committed some of the violations alleged, and accordingly, on April 9th, 1943, entered a judgment enjoining the defendant from further violating the pertinent provisions of the statute involved (R. 23). The Circuit Court of Appeals for the Fifth Circuit reversed and remanded the case for further proceedings on the grounds the lower court was in error in its appreciation of the applicable law (R. 34), and thereafter, on the application of counsel for the Administrator of the Wage and Hour Division, a writ of certiorari was granted by this Court on November 22nd, 1943 (R. 35) [64 S. Ct. 205].

On December 17th, 1943, James V. Reuter, Inc., the original defendant and respondent herein was legally dissolved in accordance with and under the laws of the State of Louisiana and its existence thereupon terminated.

ARGUMENT.

It is now well established that this Court will not proceed to a determination of a cause when its judgment

would be wholly ineffectual for want of a subject matter on which it could operate. *Mills v. Green*, 159 U. S. 651, 16 S. Ct. 132, 40 L. Ed. 293; *United States v. Hamburg-American S. S. Co.*, 239 U. S. 466, 36 S. Ct. 212, 60 L. Ed. 287. As was said by this Court in *Mills vs. Green*, *supra*:

(16 S. Ct. 133.) "The duty of this Court * * * is to decide actual controversies by a judgment which can be carried into effect. * * * It necessarily follows that when pending an appeal from the judgment of the lower court * * * an event occurs which renders it impossible for this court to grant * * * any effectual relief whatever, the court will not proceed to judgment but will dismiss the appeal."

An action pending against a corporation abates upon the dissolution of the corporation and thereupon all litigation terminates, unless the law under which it was created prolongs the life of the entity for purposes of litigation beyond the date of dissolution. *First National Bank of Selma v. Colby*, 21 Wall. 609, 88 S. Ct. 609, 22 L. Ed. 687; *Oklahoma Natural Gas Company v. State of Oklahoma*, 273 U. S. 257, 47 S. Ct. 391. In the last cited case, this court said:

(47 S. Ct. 392.) " * * * at Common law and in Federal jurisdiction, a corporation which has been dissolved is as if it did not exist, and the result of the dissolution can not be distinguished from the death of a natural person in its effect. * * * It follows, therefore, that as the death of the natural person abates all pending litigation to which such a person is a party, dissolution of a

corporation at common law abates all litigation in which the corporation is appearing either as plaintiff or defendant. To allow actions to continue would be to continue the existence of the corporation *pro hac vice*. But corporations exist for specific purposes and only by legislative act so that if the life of the corporation is to continue even only for litigating purposes it is necessary that there should be some statutory authority for the prolongation. The matter is really not procedural or controlled by the rules of the court in which the litigation pends. It concerns the fundamental law of the corporation enacted by the state which brought the corporation into being."

There is nothing in the corporation law of the State of Louisiana which prolongs the life of corporations, once dissolved according to law, for the purposes of suit, and it follows, therefore, that an injunction could no more issue against respondent in this case, than it could against a dead person.

In this case, the judgment of the lower court enjoined respondent corporation from violating the provisions of the Fair Labor Standards Act. It is clear that in order to be operative, there must be a person against whom the judgment can be enforced, and in the absence of such, no judgment that this court could render could be carried into effect. If the judgment of the Circuit Court of Appeals, which reversed and remanded the case for further proceedings is affirmed, its judgment could not be carried into effect because of the non-existence of the defendant against whom the suit was filed. If, on the other hand, the judgment of the Circuit Court is reversed

and the judgment of the District Court reinstated, the same will be ineffective, also because of the non-existence of the person against whom the injunction is directed. The case is, therefore, moot. *First National Bank of Selma v. Colby, supra*; *Oklahoma Natural Gas Co. v. State of Oklahoma, supra*.

2.

The case being moot, further proceedings can neither be had in this court, nor in the court of first instance. To dismiss the writ of certiorari, purely and simply, would leave the judgment of the Circuit Court of Appeals requiring the remand of the case for further proceedings notwithstanding the defendant no longer exists. The appropriate proceeding, therefore, according to the established practice in this court under similar circumstances is to reverse the judgment of the Circuit Court of Appeals and to remand the case with directions to dismiss the suit. *Commercial Cable Company v. Burleson*, 250 U. S. 360, 39 S. Ct. 512, 63 L. Ed. 1030; *Brownlow v. Schwartz*, 261 U. S. 216, 43 S. Ct. 263, 67 L. Ed. 620. As was said in the *Brownlow* case, *supra*: "The practice now established by this Court under similar conditions and circumstances, is to reverse the judgment below and remand the case with directions to dismiss the bill, complaint or petition." It is submitted, therefore, that the writ of certiorari heretofore granted should be recalled, and that the judgment of the Circuit Court should be reversed and

the case remanded with directions that the suit be dismissed.

Respectfully submitted,

FRANK S. NORMANN,

1605 Hibernia Bank Bldg.,

New Orleans, Louisiana,

Attorney for Mover.

APPENDIX.**EXHIBIT "A".****Affidavit of Former President of James V. Reuter, Inc.,
Dissolved.**

State of Louisiana,
Parish of Orleans.

Before me the undersigned Notary Public in and for the Parish of Orleans, State of Louisiana, personally came and appeared, James V. Reuter, a resident of the City of New Orleans, Parish of Orleans, State of Louisiana, a person of age, who declared unto me, Notary:

That James V. Reuter, Inc., a corporation organized and formerly existing under and by virtue of the laws of the State of Louisiana, domiciled at 817 Decatur Street, in the city of New Orleans, Louisiana, was legally dissolved on the 17th day of December, in the year 1943, in accordance with Section 62 of Act 250 of 1928 of the Louisiana Legislature, and that a certificate of dissolution showing that the said corporation stands as dissolved was issued by the Assistant Secretary of State of the State of Louisiana under date of December 31, 1943, as will appear from a photostatic copy attached hereto and made part hereof.

Affiant says by virtue of Section 54 of the Louisiana Business Corporation Act 250 of 1928, as amended by Section 1 of Louisiana Act 65 of 1932, a corporation may be dissolved by the unanimous consent of all of the shareholders. That the consent to dissolve may provide that the affairs of the corporation be wound up out of court, in which case the shareholders must appoint a liquidator. (See Par. I of Sec. 54 of Louisiana Act 250 of 1928, as amended, Ex. D, page 15.)

Your affiant shows as will appear from Exhibit C, par. I, page 13, all of the shareholders of James V. Reuter, Inc., by unanimous consent agreed to dissolve said corporation and appointed one of the shareholders, James V. Reuter, Esq., as the liquidator to wind up the affairs of the corporation out of court. (See Exhibit D, page 15, par. II.)

That as will appear from Exhibit B, page 12, the Assistant Secretary of State of the State of Louisiana, has acknowledged compliance with the Louisiana Business Corporation Act as to proof of publication of notice of dissolution as required by Par. II (a) of Sec. 54 of Act 250 of 1928, as amended.

Affiant further shows in compliance with Par. II (b), of Section 54 of Act 250 of 1928, Exhibit D, the consent to dissolve was signed and acknowledged by all the shareholders of said corporation. (See Exhibit C, page 13.)

Affiant further says in compliance with Par. II (c) of Sec. 54 of Act 250 of 1928, the consent to dissolve was filed in the office of the Secretary of State of the State of Louisiana (see Exhibit B) as well as in the office of the Recorder of Mortgages for the Parish of Orleans in which Parish the corporation had its registered office. (See Exhibit C, page 13.)

Affiant further says by virtue of Section 64 of the Louisiana Business Corporation Act 250 of 1928, any corporate action may be had by unanimous consent without a meeting of shareholders. (See Exhibit E, page 17.)

Affiant further says, in compliance with Section 62, Par. I, of the Louisiana Business Corporation Act 250 of 1928, (See Exhibit F, page 18) the liquidator of said

corporation signed a certificate and acknowledged that the corporation had been completely wound up and dissolved. (See Exhibit C, page 13.)

That in further compliance with the foregoing Section 62, Par. II, (Exhibit F), the liquidator delivered to the Secretary of State the certificate provided for in the above paragraph, who filed the same in his office, whereupon the corporation's existence terminated and a certificate of dissolution was issued evidencing that fact. (See Exhibit B, page 12.) That said certificate of dissolution was recorded in the office of the Recorder of Mortgages in the Parish of Orleans in which Parish the corporation had its registered office.

Affiant further says that said corporation ceased to exist as a corporate entity upon the issuance of the certificate of dissolution issued by the Assistant Secretary of State of the State of Louisiana, and that the corporation is not now nor has it been transacting any business nor is it permitted to transact any business since the date of its dissolution.

That the said dissolved corporation has not applied for nor has it renewed its license application to continue in business, nor could it make such an application by reason of having been dissolved.

That the business of the corporation has been completely liquidated and the former shareholders have received in return for their stockholdings their pro-rata interest in and to the assets of the dissolved corporation.

That this affidavit is made in support of the motion filed with the Supreme Court of the United States to recall the Writ of Certiorari granted in the case of L. Metcalfe Walling, Administrator of the Wage and Hour Division,

United States Department of Labor, Petitioner, versus
James V. Reuter, Inc., respondent, No. 436 of the Docket
of said Court.

(Sgd.)

JAMES V. REUTER.

Sworn to and subscribed before me this 26th day of
January, 1944.

(Sgd.)

F. S. NORMANN,

Notary Public in and for the
Parish of Orleans, State of
Louisiana.

Exhibit "A", Affidavit filed in original form.

*Exhibits "B" and "C" are photostatic copies, showing original
recordations of Parish Official and Assistant Secretary of State.*

EXHIBIT "B"**State of Louisiana**

I, the undersigned Assistant Secretary of State, of the State of Louisiana, do hereby certify that consent to dissolve James V. Reuter, Inc., domiciled at New Orleans, Louisiana, and the appointment of James V. Reuter, 817 Decatur Street, New Orleans, signed and acknowledged by the stockholders, before a Notary Public, on the fifteenth day of December, 1943, with proof of publication of notice of dissolution, as required by Section 54 of Act 250 of 1928, as amended by Act 65 of 1932, and certificate of the liquidator showing that the affairs of the corporation have been completely wound up and dissolved, in compliance with Section 62 of Act 250 of 1928, as amended, acknowledged before a Notary Public on the seventeenth day of December, 1943, have been filed in this office on this the thirty-first day of December, 1943, recorded in book "Record of Charters" No. 184, folio , and the corporation stands dissolved.

Given under my signature, authenticated with the impress of my Seal of office, at the City of Baton Rouge, this 31st day of December, A. D. 1943.

H. C. COMISH,

Assistant Secretary of State.

I, the undersigned Recorder of Mortgages in and for the Parish of Orleans, State of Louisiana, do hereby certify that the above and foregoing act of Dissolution of James V. Reuter, Inc., was this day duly recorded in my office in Book 1658, folio 304, New Orleans, 1-10-1944 at 3:10 P. M..

J. O'HANLON, D. R.

EXHIBIT "C".**Consent of Shareholders for Dissolution of Corporation.**

We, the undersigned shareholders of James V. Reuter, Inc., hereby consent to the immediate voluntary dissolution out of court of James V. Reuter, Inc., and do hereby appoint James V. Reuter, 817 Decatur Street, New Orleans, Louisiana, as liquidator thereof with full power and authority to liquidate and dissolve said corporation and without bond.

Thus done and signed at New Orleans, La., on this the 15th day of December, 1943.

(Sgd.) JAMES V. REUTER,
Shareholder,

(Sgd.) CLARA D. REUTER,
Shareholder,

(Sgd.) R. N. BURG,
Shareholder.

State of Louisiana,
Parish of Orleans. ss.

Before me, the undersigned authority, personally came and appeared:

James V. Reuter,
Clara D. Reuter,
R. N. Burg,

who, after being duly sworn by me, Notary, did depose and say that they are the sole and only shareholders of all the outstanding shares of stock in James V. Reuter, Inc., that they are the same persons whose signatures appear in the foregoing consent, and that they have executed same in their capacity as shareholders of James V. Reuter, Inc.

(Sgd.) JAMES V. REUTER,
(Sgd.) CLARA D. REUTER,
(Sgd.) R. N. BURG.

Sworn and subscribed to before me this 15th day of December, 1943.

(Sgd.)

F. S. NORMANN,
Notary Public.

Certificate.

I, James V. Reuter, duly appointed liquidator of James V. Reuter, Inc., by the unanimous consent of the shareholders thereof, do hereby certify that the said corporation has been completely wound up and is dissolved.

Wherefore, I, as liquidator, hereby request that a Certificate of Dissolution by the Secretary of State, declaring the dissolution of the said James V. Reuter, Inc.

(Sgd.)

JAMES V. REUTER,
Liquidator.

State of Louisiana,
Parish of Orleans. ss.

Before me, the undersigned authority, personally came and appeared: James V. Reuter, who deposed that he is the liquidator of James V. Reuter, Inc., and as such authorized make the above certificate, and that all the statements therein made are true.

(Sgd.)

JAMES V. REUTER.

Sworn and subscribed to before me this 16th day of December, 1943.

(Sgd.)

F. S. NORMANN,
Notary Public.

The undersigned Recorder of Mortgages in and for the Parish of Orleans, State of Louisiana, do hereby certify that the above and foregoing Act of Dissolution of the James V. Reuter, Inc., was this day duly recorded in my office in Book 1666, Folio 46.

New Orleans, 12-16-1943, at 12:45 P. M.

(Sgd.)

J. O'HANLON,
Dep. Rec.

EXHIBIT "D".

Extracts from Section 54 of Act 250 of the Louisiana Legislature of 1928, as Amended by Section 1 of Act 65 of 1932.

Section 54: Voluntary Proceedings for Dissolution.

I. Voluntary proceedings for dissolution may be commenced whenever a resolution to dissolve is adopted by the holders of at least two-thirds of the voting power, or such larger percentage as the articles may provide, at a shareholders' meeting duly called for that purpose, or by unanimous written consent as provided in Section 64.

II. The resolution or consent may provide that the affairs of the corporation shall be wound up out of court, in which case the shareholders must, at the same time, appoint a liquidator or liquidators to conduct the winding up, but such appointment shall not be operative until

(a) Notice of adoption of such resolution or signing of such consent, stating also whether or not the corporation is to be wound up out of court, and if so, giving the names and post-office addresses of the liquidators named in such resolution or consent, shall have been published in a newspaper of general circulation in the parish in which the corporation's registered office is located at least one time, and a copy thereof, with the affidavit of the publisher of such newspaper to the fact of such publication attached, has been filed with the Secretary of State; and

(b) Duplicate copies of such resolutions, duly certified by the secretary of the corporation or of the meeting, shall have been signed and acknowledged by at least one shareholder authorized so to do by said meeting, or by a

majority of the directors, or by the shareholders holding a majority of the voting power of all shares; or if such proceedings be commenced without a meeting, but by written consent, duplicate copies of such consent shall have been signed by all such shareholders and acknowledged by at least one of them; and

(c) One of such copies shall have been filed for record in the office of the Secretary of State, and the other copy filed for record in the office of the recorder of mortgages of the parish in which the corporation has its registered office.

EXHIBIT "E".**Extract from Section 64 of Act 250 of the Louisiana Legislature of 1928.**

Section 64: Any corporate action may be had by unanimous consent without a meeting of shareholders.

I. Whenever by any provision of this act or the articles, the affirmative vote of all or a certain percentage of shareholders having voting power, and/or of one or more classes of shareholders having voting power, on the particular question, is made necessary to authorize or constitute corporate action, the consent in writing to such corporate action of all of the shareholders, and/or all the shareholders of a class or classes of shareholders, having voting power on such particular question, shall be sufficient for such purpose, without necessity for a meeting of such shareholders, or class or classes of shareholders.

EXHIBIT "F".**Section 62 of Act No. 250 of the Louisiana Legislature
of 1928.**

Section 62: Order or Certificate of Dissolution; Filing same.

I. When a corporation has been completely wound up, the court, if the proceeding is subject to the supervision of the Court, shall make an order declaring the corporation to be dissolved; and if the proceeding is out of court, the liquidator or liquidators shall sign and acknowledge a certificate stating that the corporation has been completely wound up and is dissolved.

II. Said order or certificate of dissolution shall be delivered to the Secretary of State, who shall file the same in his office, and thereupon the corporate existence shall terminate, and the Secretary of State shall issue a certificate of dissolution, which shall forthwith be filed for record in the office of the Recorder of Mortgages in the parish in which the corporation has its last registered office.

III. Any assets inadvertently or otherwise omitted from the winding up shall vest in the liquidator or liquidators, for the benefit of the persons who would have been entitled thereto if they had been in their hands before the dissolution of the corporation, and on realization shall be distributed accordingly.